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IN THE

Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER UTILITY AIR REGULATORY GROUP, ET AL.

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RULE 29.6 DISCLOSURE STATEMENTS

Petitioner

Utility Air Regulatory Group ("UARG") is an ad hoc, unincorporated association of individual electric generating companies and industry trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

Respondents in Support of Petitioner

American Public Power Association ("APPA") is a nonprofit trade association whose members are units of state and local governments that own and operate electric generating, distribution and transmission assets. APPA addresses issues of interest to its members, including those issues related to the development and implementation of requirements under federal and state Clean Air Act programs. APPA does not have any outstanding securities in the hands of the public, nor does APPA have a publicly owned parent, subsidiary, or affiliate.

ARIPPA is a non-profit trade association that represents a membership primarily comprised of electric generating plants using environmentally-friendly circulating fluidized bed boiler technology to convert coal refuse and/or other alternative fuels such as biomass into alternative energy and/or steam, with the resultant alkaline ash used to reclaim mine lands. ARIPPA was organized in 1988

for the purpose of promoting the professional, legislative and technical interests of its member facilities. ARIPPA has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Gulf Coast Lignite Coalition ("GCLC") is a non-profit corporation organized under the laws of the State of Texas and comprised of individual electric generating and mining companies. GCLC participates on behalf of its members collectively in proceedings brought under United States environmental regulations, and in litigation arising from those proceedings, which affect electric generators and mines. GCLC has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in GCLC.

Kansas City Board Of Public Utilities-Unified Government Wyandotte County/Kansas City, Kansas is not required to provide a Rule 29.6 Disclosure Statement because it is a governmental entity organized under the laws of the State of Kansas. Accordingly, no Disclosure Statement is being provided.

White Stallion Energy Center, LLC ("WSEC") is a limited liability company organized under the laws of the State of Texas engaged in the business of energy development and production. Maris Investment Company, LLC, and Sky Global Partners, LLC each hold a 10% or greater ownership interest in it.

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INTRODUCTION

Section §112(n)(1)(A) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §7412(n)(1)(A), requires the U.S. Environmental Protection Agency ("EPA" or "Agency") to decide whether "regulation" of hazardous air pollutant ("HAP") emissions from electric utility generating units ("EGUs") "under this section" is "appropriate and necessary" after considering a study that addresses only two subjects: (1) "hazards to public health" that remain "after imposition of the requirements of this chapter," and (2) "alternative control strategies for emissions which may warrant regulation."

In §7412(n)(1)(A), EPA's first task is to find that a residual public health hazard is posed by specific EGU HAP emissions remaining after those emissions have been reduced under other provisions of the Act, and to identify alternative control strategies to reduce further any emissions that "may warrant regulation." Next, if it finds any remaining EGU HAP emissions pose a health hazard, EPA must determine how to regulate those emissions "under this section."

Different subsections of §7412 provide different decisional standards for regulating HAP emissions "under this section," including subsections (d)(2) ("maximum achievable" control technology); (d)(3) ("floor" control technology); (d)(5) ("generally available control technolog[y]"); (f) ("ample margin of safety"); (m) ("necessary and appropriate"); and (n) itself. Once EPA determines the HAP emissions that warrant regulation and the degree to which those EGU emissions would be regulated under §7412, EPA must resolve whether or not "*such regulation*" under

this section "is appropriate and necessary." Costs, along with potentially myriad other factors, are relevant in applying this broad regulatory decisional standard that concludes the §7412(n)(1)(A) process.

Notwithstanding its mischaracterization of the *Chevron* standard, see National Mining Ass'n Reply Br. 1-2, 9, EPA is right that the interpretive question before the Court is whether the term "appropriate" requires EPA to consider costs "when deciding ... to regulate" EGUs. EPA Br. 21. After correctly stating the question, however, EPA addresses a wholly different question—that is, whether the term "appropriate" makes costs relevant to "listing" decisions under §7412(c). See, *e.g.*, *id.* at 17, 18, 28, 36, 48, 57 (arguing that "appropriate" addresses the threshold "listing" decision).

According to EPA, if any EGU HAP emission threatens "health or the environment" (*i.e.*, satisfies the criteria for "area source" listing under §7412(c)), EPA can find that it is "appropriate and necessary" to list, and that ends EPA's responsibilities under §7412(n)(1)(A). *Id.* at 26. But "to list or not to list" is not the question raised by §7412(n)(1)(A); the question raised by that section is whether additional "regulation" of EGU HAP emissions "under this section" is "appropriate and necessary." The statutory question calls for a decision to authorize or to preclude specific regulation of EGU HAP emissions under §7412.

This Court long ago made it clear that agency decision-making is unreasonable whenever it has "failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). EPA's failure

to make the §7412(n)(1)(A) finding whether "such regulation" under §7412 is "appropriate and necessary" after considering costs and other consequences of that decision was *per se* unreasonable.

ARGUMENT

This case presents a stark difference in how the parties read §7412(n)(1)(A). According to EPA and its respondents, EPA's obligation under this provision is discharged once EPA concludes that "listing" under §7412(c) is "appropriate and necessary." In Petitioners' view, EPA's obligation under §7412(n)(1)(A) is not discharged until EPA decides on the regulatory standard to apply "under this section"—whether using §7412(d) or some other regulatory metric—and then determines that "such regulation" is "appropriate and necessary." For the reasons discussed below, EPA's construction of §7412(n)(1)(A) is wrong and the Mercury and Air Toxics Standards ("MATS Rule") is unlawful.

I. "Appropriate and Necessary" Is Not Used in §7412(n)(1)(A) to Decide Whether, or Not, to List EGUs Under §7412(c), But Is the Ultimate Decisional Standard Governing Whether or Not to Regulate Under §7412 EGU HAP Emissions That Pose Public Health Risks.

EPA's brief presents a clearly drawn distinction between the parties' positions regarding the role of §7412(n)(1)(A) and the relevance of costs under that provision. According to EPA and its respondents, the phrase "appropriate and necessary" merely describes a "special procedure" related to listing EGUs under §7412(c). EPA Br. 7. As EPA sees it, §7412(n)(1)(A) provides that, once the study of re-

maining EGU health hazards is completed, it is "appropriate and necessary" to list EGUs under §7412(c) when the criteria for listing would otherwise be present after implementation of other EGU emission reductions under the Act. *Id.* at 32 ("[I]t is farfetched to suppose ... Congress required the agency to use listing criteria fundamentally different from those that Congress had mandated for all other stationary-source categories." (emphasis omitted)).

By contrast, in the Utility Air Regulatory Group's ("UARG's") view, the term "appropriate and necessary" calls on EPA to make the ultimate substantive regulatory determination with respect to §7412 regulation of EGU HAP emissions: Specific regulation under §7412 limiting EGU HAP emissions may be adopted by EPA only if "such regulation is appropriate and necessary" after considering remaining public health hazards and alternative control strategies for those HAP emissions that "may warrant regulation." This decisional standard applies at the end of the §7412(n)(1)(A) regulatory process to resolve whether to promulgate, or to reject, a specific type and level of regulation for any EGU HAP emissions posing health hazards. Resolving the nature of EPA's "appropriate and necessary" finding resolves the "contextual" debate in this case.

EPA describes the "appropriate and necessary" language in §7412(n)(1)(A) as "a special procedure that EPA must follow before deciding *whether to list* power plants for regulation under the [national emission standards for hazardous air pollutants ('NESHAP')] program." EPA Br. 7 (emphasis added). Through this prism, EPA and respondents repeat over and over statements to the effect that nothing in "the text of [§7412(n)(1)(A), or in] ... Congress's rea-

sons for enacting it, suggest that Congress wished to encourage (much less require) EPA to consider costs *in making the threshold listing decision*." *Id.* at 18 (emphasis added); see also *id.* at 17, 18, 28, 36 (describing the §7412(n)(1)(A) determination as a threshold "listing" determination). To find that EGU regulation is "appropriate," EPA need only complete its study of remaining hazards and find that, if any remaining EGU HAP emissions pose a threat to "public health or the environment," listing is "appropriate." *Id.* at 11, 26.

Furthermore, because EPA interprets §7412 to require regulation of EGUs the same as other source categories, if a "single" HAP emitted by an EGU "poses a hazard to public health or the environment" requiring listing, EPA must "promulgate standards for all hazardous air pollutants emitted" by EGUs, regardless of cost or hazard. *Id.* at 12, 45 ("[I]f EPA lists power plants ... [under] Section 7412(n)(1)(A), those facilities will be subject to the same standard-setting provisions that govern stationary sources within all other [§7412(c)] listed categories."). Given this interpretation of §7412, EPA continues, §7412(n)(1)(A) "does not mandate distinct 'appropriate and necessary' findings for each individual pollutant [being regulated]" because §7412(c) listing can be triggered by a single HAP. *Id.* at 12. Rather, EPA's §7412(n)(1)(A) responsibilities end with listing EGUs, and Congress's mandate that all HAPs emitted by a source category listed under §7412(c) be regulated under §7412(d) governs everything that follows listing. *Id.* at 30.

If §7412(n)(1)(A)'s only function is, as EPA claims, to confirm that "listing" under §7412(c) is "appropriate" based on a remaining threat to "public health or

the environment," cost would be irrelevant to that narrow decision. See *id.* at 30 n.8 ("Congress would not have expected EPA to consider—at the listing stage—the cost of complying with emission standards that had not yet been formulated."). The contrast between what EPA would have §7412(n)(1)(A) say and the actual language of that provision, however, is striking.

Section 7412(n)(1)(A) calls for EPA to prepare "a study" ("Utility Study") identifying those EGU emissions that pose a "hazard[] to public health" after compliance with other EGU CAA control programs, and then to evaluate alternative control strategies for only those EGU HAP emissions that "may warrant regulation." That Utility Study, and only that Utility Study, was identified by Congress for consideration by EPA in making an "appropriate and necessary" decision under §7412(n)(1)(A). Under the terms of the statute, the Utility Study addresses factors irrelevant to §7412(c) listing (*e.g.*, alternative strategies to control emissions posing health hazards) and ignores two of the three factors relevant to listing (*i.e.*, HAP tonnages and HAP "environmental" threats). In other words, there is a fundamental disconnect between the subject matter of the Utility Study and the criteria for listing. But there is a direct connection between the Utility Study and whether and how regulation of those EGU emissions posing remaining hazards to public health might be regulated "under this section" *if* "appropriate and necessary" (*e.g.*, identification of alternative control strategies for HAP emissions where further reductions may be "warrant[ed]").

Furthermore, under EPA's construction of §7412(n)(1)(A), if the Utility Study had not identified

any EGU HAP emissions that posed a health hazard, EPA could still find that listing is "appropriate" based on an "environmental" risk, and that simple finding would satisfy §7412(n)(1)(A). Following listing, EPA could promulgate §7412(d) standards regulating all EGU HAP emissions—even emissions that pose no residual public health risk—and could promulgate these standards without any evaluation of whether "such regulation" was "appropriate and necessary." EPA Br. 30. That result is not consistent with any reasonable interpretation of the language of §7412(n)(1)(A).

In §7412(n)(1)(A), Congress did not—as EPA claims—"implicitly authorize[] EPA to determine the 'appropriate[ness]' of *such listing*." *Id.* at 23 (emphasis added). Instead, Congress *required* EPA to "*regulate ... under ... section [7412]*" HAP emissions from EGUs that pose residual public health "hazards," but *only "if* the Administrator finds *such regulation is appropriate and necessary* after considering the [study] results." 42 U.S.C. §7412(n)(1)(A) (emphases added). Section 7412(n)(1)(A) does not mention listing because listing is only a precondition to regulation under one subsection of §7412: §7412(d), the subsection under which EPA chose to regulate EGUs in this case. Only after EPA determined what those standards would require could EPA make the "appropriate and necessary" finding called for in §7412(n)(1)(A), as written by Congress: whether or not "*such [§7412] regulation* [of EGU emissions] is appropriate and necessary." *Id.* (emphasis added).

At the time of the 1990 Amendments, EGU HAP emissions had been extensively controlled under other CAA programs and were targeted for substantial further reductions under the 1990 Amendments. See

UARG Opening Br. 9-11. By contrast, the §7412(d) regulatory program was established to bring about expeditious regulation of non-EGU source categories that had avoided regulation under the pre-1990 HAPs emission standards program. Congress made costs (and a whole host of other factors) irrelevant to the §7412(c) listing decision, which must be made as a prerequisite to initiating §7412(d) standard setting.

As enacted by Congress in 1990, only two factors are relevant to listing under §7412(c): whether tonnage thresholds are exceeded (for major sources) and whether emissions pose a "health or environmental" threat (for area sources). In construing EPA's §7412(n)(1)(A) "appropriate and necessary" responsibilities to be fully discharged once EGUs are listed under §7412(c), see, *e.g.*, EPA Br. 26, EPA gives no content to §7412(n)(1)(A)'s direction to EPA to determine whether "such regulation" under this section is "appropriate and necessary." Because §7412(c) listing precedes any regulation of HAP emissions, it cannot discharge EPA's obligation to engage the question whether or not standards under §7412(d) (or any other subsection of §7412 under which the Administrator may choose to regulate) are "appropriate and necessary."

In sum, "appropriate and necessary" is not a finding focused on §7412(c) "listing" It is a finding that must follow the identification of "hazards to public health" in the Utility Study and the determination of how emissions posing a hazard should be regulated "under" §7412. Only after EPA determines the reductions in EGU emissions required by that "regulation" would EPA have the information that it must have to discharge its §7412(n)(1)(A) obligation to determine whether "such regulation" is "appropriate

and necessary." For these reasons, the "appropriate and necessary" finding is an independent regulatory standard that authorizes, limits, or precludes regulation of EGU emissions under §7412. A broad range of factors—including costs—are relevant to that kind of a regulatory judgment.

II. Section 7412(n)(1)(A) Authorizes "Residual Risk" Regulation Only If "Such Regulation" Is "Appropriate and Necessary."

On its face, §7412(n)(1)(A) is a "residual risk" regulatory provision. It focuses exclusively on regulation of "hazards to public health" from EGU HAP emissions that are "reasonably anticipated to occur ... after imposition of ... requirements" of the Act, and requires EPA to determine whether further regulation of EGU HAP emissions that pose public health hazards is "appropriate and necessary." 42 U.S.C. §7412(n)(1)(A). In this context, "appropriate and necessary" requires EPA to make a risk management decision regarding whether and, if so, the degree to which health risks need to be reduced. This is a policy judgment to which cost is relevant. See UARG Opening Br. 26.[1]

In the MATS rulemaking, EPA promulgated three different §7412(d) standards that have significant cost consequence for EGUs: (i) standards for mercury emissions, (ii) standards for emissions of "non-mercury metals," and (iii) standards for "acid gases." The relevance of cost to determining whether

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[1] For these reasons, State Respondents' argument that §7412(n)(1)(A) does not call for a residual risk determination "because no such [§7412] standards have ever been in place" for EGUs, State Resp'ts' Br. 25, profoundly misses the point.

"such regulation" under §7412 is "appropriate and necessary" is illustrated by the consequences of regulation under each of these §7412(d) standards.

In the case of mercury, the §7412(d) standard will cost approximately $3 billion dollars annually, *Amici Curiae* Brief of the Chamber of Commerce of the United States of America, *et al.* in Support of Petitioners ("Chamber Br.") 22, and is claimed by EPA to reduce developmental health risks across the country posed by current and past exposures. Had EPA considered costs, it is unclear whether the Agency would have been able to explain why regulation is "appropriate and necessary" in light of the projected quantitative and qualitative health benefits. See *Amicus Curiae* Br. of Cato Institute in Supp. of Pet'rs. But there is no lack of clarity for the other two §7412(d) standards.

In the case of non-mercury HAP metals, only a small subset of EGUs were projected by EPA to result in public health risks slightly exceeding EPA's one-in-one million *de minimis* risk threshold, and EPA projected no risk for the remaining EGUs subject to the standard. UARG Opening Br. 13. These are risk levels that EPA has determined protect "public health" with an "ample margin of safety" in §7412(f) "residual risk" rulemakings. *Id.* at 8; *Natural Res. Def. Council* v. *EPA*, 529 F.3d 1077, 1081-83 (D.C. Cir. 2008). By comparison to these insignificant health risks, the §7412(d) non-mercury metal standards impose control costs of approximately $1 billion annually on all EGUs that emit non-mercury metals. Chamber Br. 22-23.

In the case of acid gases, EPA's standards do not address *any* public health hazard, but only an as-

serted "environmental" threat and will impose annual costs that are almost two times the mercury costs. UARG Opening Br. 19. This $5 billion annual expenditure will result in approximately a 40,000 ton reduction in hydrogen chloride (and lesser amounts of other) acid gas emissions, UARG Pet. App. 442a, all for no health benefit. By shifting the focus of the "appropriate and necessary" determination from "regulation" under §7412 to "listing" under §7412(c), EPA avoided addressing the statutory question: Is "such regulation" "appropriate and necessary" to address residual public health risk.

EPA argues that it is "irrelevant" whether or not §7412(n)(1)(A) addresses regulation of residual risk, asserting that "[t]he fact that a particular CAA provision" like §7412(n)(1)(A) "requires EPA to take account of existing regulatory requirements when deciding whether to impose further regulation" simply has "no bearing" on whether EPA should have "consider[ed] costs in making" its finding to list. EPA Br. 51, 52. That argument fails for the reasons discussed above. Section 7412(n)(1)(A) asks whether or not "regulation" is "appropriate and necessary" in response to a health hazard, not "listing."

More fundamentally, §7412(f)(2)(B) confirms Congress's general approach to regulation of residual risk under §7412. Section 7412(f) is a residual risk provision because its focus is on whether or not to reduce "public health" or "environmental" risks posed by emissions that remain after implementation of control requirements under §7412(d). In the September 1989 *Federal Register* notice referenced by Congress in §7412(f)(2)(B), EPA affirmed that, in determining whether and how to regulate any remaining health risk under the "ample margin of safety

standard," EPA would take into account all "relevant factors including *costs and economic impacts*, technological feasibility, and other factors relevant to each particular decision." 54 Fed. Reg. 38,044, 38,045 (Sept. 14, 1989) (emphasis added). As a result, even if *Natural Resources Defense Council* v. *EPA*, 824 F.2d 1146 (D.C. Cir. 1987), only held that EPA had "discretion" to consider costs in establishing an "ample margin of safety," EPA Br. 52, EPA exercised its *Chevron* Step Two discretion to give "ample margin of safety" that interpretation after that decision, and Congress adopted that interpretation in the CAA.[2]

Congress included the §7412(n) residual risk provision in the 1990 Amendments because EGUs were already extensively controlled, and those controls would result in significant reductions in EGU HAPs. In the case of acid gases, for example, other CAA programs have resulted in millions of tons of reduction in emissions, at a fraction of the cost of the thousands of tons of acid gas emissions reduction mandated by the MATS Rule.

To conclude that Congress intended to give EPA discretion to negate a carefully crafted, market-based "acid deposition" program established in the 1990 Amendments by allowing EPA to impose command and control regulation on EGU acid gases under §7412 is a bridge too far. Congress's focus on only residual public health hazards in §7412(n)(1)(A), *not*

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[2] Cf. *Natural Res. Def. Council*, 529 F.3d at 1082 ("The word 'interpretation' [as used in §7412(f)(2)(B)] indicates that the savings clause is not limited to EPA's benzene-specific determinations, but *applies broadly to the agency's construction of the Clean Air Act*" as set forth in the benzene standard. (emphasis added)).

both health and environment threats as provided in §7412(f) and (m), took acid gases off the §7412 "regulatory table" for EGUs, leaving a mandate to regulate only as "appropriate and necessary" to reduce remaining health risks. This broad subjective policy judgment requires consideration of all regulatory consequences, including cost.

CONCLUSION

The judgment below should be reversed. Further, because of regulatory extensions granted by certain states, approximately 130 EGUs still face a future compliance date for the MATS Rule, by which they must shut down or install costly control technology. In light of these impending deadlines and the lead-time needed to adjust compliance plans accordingly, UARG requests that, if the rule is remanded for further rulemaking, the Court direct that all future compliance dates be suspended pending any such additional rulemaking, and order such further relief as is necessary based on this Court's decision.

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